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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT D. PITTMAN,

Defendant and Appellant.

F048369

(Super. Ct. No. BF109481)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Paul E. Lacy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Harry J. Colombo, Deputy Attorney General, for Plaintiff and Respondent.

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A jury found Robert Pittman (Appellant) received stolen property (Pen. Code,<sup>1</sup> § 496, subd. (a); count 1), committed second degree burglary (§ 460, subd. (b); count 2),

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\*Before Levy, Acting P.J., Cornell, J., and Gomes, J.

<sup>1</sup> Further statutory references are to the Penal Code.

and passed a forged check (§ 470, subd. (d); count 3). The trial court subsequently determined Appellant served three prior prison terms (§ 667.5, subd. (b)) and sentenced him to a total of six years imprisonment. Appellant contends the trial court erred by failing to stay punishment for the burglary and forgery counts, and by imposing upper prison terms without submitting the aggravating factors to the jury. We agree with the Attorney General that the trial court should have stayed punishment for forgery, but not burglary, and find no error with the trial court imposing the upper terms.

### **BACKGROUND**

Shannon Lee Buck's purse and checkbook were stolen on February 23, 2005. Two days later, Buck received a telephone call from her Bakersfield bank informing her Appellant was attempting to cash one of her stolen checks for \$300. Both Buck and the bank employee telephoned the police.

Bakersfield Police Officer Aaron Stringer arrested Appellant at the bank and informed him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant explained his friend Buford asked him to cash the check because he had found a ring and the owner wanted to give him a \$300 reward, but Buford did not have any identification. Officer Stringer asked Appellant if he knew the check was stolen before entering the bank; Appellant responded, "I thought it was stolen but was hoping it wasn't."

### **DISCUSSION**

The trial court sentenced Appellant to three concurrent upper three-year terms for receiving stolen property, burglary, and passing a forged check. The trial court also enhanced the sentence for receiving stolen property in count 1 by an additional three years based on the three prison priors, resulting in an aggregate sentence of six years. Appellant contends the burglary and forgery sentences should have been stayed, rather than imposed concurrently, and that the jury should have determined any circumstances in aggravation before the trial court imposed upper term.

## **I. Section 654**

Appellant believes the trial court erred by failing to stay punishment for burglary and passing a forged check because he was already sentenced for receiving stolen property and all three crimes were part of a single course of conduct. Section 564<sup>2</sup> prohibits multiple punishments for separate crimes committed with a single criminal objective. (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1311.)

“Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the ‘intent and objective’ of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

Imposing a concurrent sentence that should have been stayed under section 654 “simply does not satisfy the prohibition against double punishment.” (*People v. Pena, supra*, 7 Cal.App.4th at p. 1312.) The determination whether the facts and circumstances reveal a single intent and objective within the meaning of section 654 is a question of fact. (*Peole v. Harrison* (1989) 48 Cal.3d 321, 335.) Because the trial court here did not expressly determine whether a defendant’s actions constitute a single course of conduct, we must presume the finding was made as inherent in imposing separate sentences. We may reverse the trial court’s determination only if it is unsupported by substantial evidence. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.)

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<sup>2</sup> Section 654, subdivision (a) provides, in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision ....”

Appellant notes that accepting the version of events necessarily found by the jury in convicting him of all three offenses, he “received a stolen and forged check made payable to himself, took that check into a bank with the intention of cashing it, and presented it to the teller in an effort to cash it.” He believes receiving the stolen property and burglary were both incidental to his single criminal objective of cashing the check.

Like the Attorney General, we only partially agree with Appellant. Appellant is correct that entering the bank with the intent to pass the forged check constituted a single, indivisible course of conduct to obtain funds from the account by fraud. Accordingly, he should not have been punished for both burglary and forgery under counts 2 and 3. We therefore will modify the judgment and stay punishment on count 3.

As the prosecution argued to the jury, however, Appellant had a stolen check in his possession before he entered the bank. Although Appellant claimed he accepted the check shortly before, the check had been stolen days earlier. From the surrounding circumstances, the trial court could have reasonably concluded Appellant simply accepted the check -- either directly at the time it was stolen or from Buford as he claimed -- before he formed the intent to enter the bank and attempted to cash it. His conduct in receiving the stolen property was not so intertwined with his subsequent burglary and attempt to pass the forged check that it constituted an indivisible course of conduct prohibiting separate punishment under section 654. Accordingly, the trial court reasonably imposed separate sentences for receiving stolen property and burglary in counts 1 and 2.

## **II. *Upper-term Sentences***

Appellant further contends the trial court violated the constitutional principles enunciated in *Blakely v. Washington* (2004) 542 U.S. 296 in imposing upper prison terms by relying on aggravating sentencing factors not determined by a jury. In California,

however, imposition of an upper term is the statutory maximum and does not abridge a defendant's right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1261 ["we do not believe that the high court's decisions compel the conclusion that the trial court's identification of aggravating factors, in selecting a sentence within the upper, middle, and lower term range of sentences provided under California law, is unconstitutional."]) Bound by the California Supreme Court's determination, we must reject Appellant's claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### **DISPOSITION**

The judgment is modified by staying pursuant to section 654 the three-year concurrent prison term imposed for passing a forged check under section 470, subdivision (d) in count 3. The judgment is affirmed in all other respects. The trial court is directed to issue an amended abstract of judgment and forward a certified copy to the Department of Corrections.